APPEAL NO. 161245
FILED AUGUST 31, 2016

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on May 11, 2016, in Houston, Texas, with (hearing officer) presiding as hearing officer. The hearing officer resolved the disputed issues by deciding that: (1) the compensable injury of (date of injury), does not extend to a ruptured tendon in the right foot, recurrent dislocation of the right ankle, right LOC primary osteoarthrosis, right knee cysts of the anterior margin of the anterior cruciate ligament, intrasubstance degeneration in the posterior horn of the medial meniscus, and right ankle tear of the flexor hallucis longus tendon; (2) the appellant/cross-respondent (claimant) reached maximum medical improvement (MMI) on May 8, 2015; and (3) the claimant's impairment rating (IR) is 16%.

The claimant appealed the hearing officer's extent-of-injury determination, arguing that the evidence was sufficient to support a determination that the compensable injury extends to the conditions in dispute. The appeal file does not contain a response from the respondent/cross-appellant (self-insured) to the claimant's appeal. However, the self-insured appealed, disputing the hearing officer's determinations of MMI and IR. The self-insured contends that certification adopted by the hearing officer included conditions that were not compensable. The self-insured argues that the preponderance of the evidence was contrary to the certification of MMI/IR of (Dr. W), the Texas Department of Insurance, Division of Workers' Compensation (Division) appointed designated doctor. The appeal file does not contain a response from the claimant to the self-insured's appeal.

DECISION

Affirmed in part and reversed and remanded in part.

The parties stipulated that the claimant sustained a compensable injury on (date of injury), that consisted of a right ankle sprain/strain and right knee sprain/strain. The claimant testified she was mopping the gym floor when she twisted her right ankle and fell on her right knee.

**EXTENT OF INJURY**

The hearing officer's determination that the compensable injury of (date of injury), does not extend to a ruptured tendon in the right foot, recurrent dislocation of the right ankle, right LOC primary osteoarthrosis, right knee cysts of the anterior margin of the

anterior cruciate ligament, intrasubstance degeneration in the posterior horn of the medial meniscus, and right ankle tear of the flexor hallucis longus tendon is supported by sufficient evidence and is affirmed.

**MMI AND IR**

Section 401.011(30)(A) defines MMI as "the earliest date after which, based on reasonable medical probability, further material recovery from or lasting improvement to an injury can no longer reasonably be anticipated." Section 408.1225(c) provides that the report of the designated doctor has presumptive weight, and the Division shall base its determination of whether the employee has reached MMI on the report of the designated doctor unless the preponderance of the other medical evidence is to the contrary.

Section 408.125(c) provides that the report of the designated doctor shall have presumptive weight, and the Division shall base the IR on that report unless the preponderance of the other medical evidence is to the contrary, and that, if the preponderance of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Division, the Division shall adopt the IR of one of the other doctors. 28 TEX. ADMIN. CODE § 130.1(c)(3) (Rule 130.1(c)(3)) provides that the assignment of an IR for the current compensable injury shall be based on the injured employee's condition as of the MMI date considering the medical record and the certifying examination.

The parties stipulated that the Division appointed Dr. W was the designated doctor to give an opinion on the issues of MMI, IR, and extent of injury. Dr. W initially examined the claimant on March 20, 2015. Dr. W certified that for the compensable conditions of right ankle sprain/strain and right knee sprain/strain the claimant reached MMI on July 10, 2013, with a 13% IR, using the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides). Dr. W explained that the claimant reached MMI on the date physical therapy was completed. Dr. W assessed 4% impairment for loss of range of motion of the right knee and 9% impairment for loss of range of motion of the right ankle. Dr. W combined the impairment assessed for the right ankle with the impairment assessed for the right knee for a total whole person impairment of 13%.

Dr. W subsequently examined the claimant a second time on October 15, 2015. Based on that examination, Dr. W certified that the claimant reached MMI on May 8, 2015, with a 16% IR. In the accompanying narrative, Dr. W stated in part that, "it has been administratively determined that [s]tatutory MMI has been reached on [May 8, 2015], and therefore, that is the date I have been ordered to assign as MMI. . . ." Dr. W

went on to state that, "since I have not been informed otherwise about the outcome regarding the acceptance of the disputed injuries/diagnoses that I determined in my [March 20, 2015] certifying exam were included as part of the compensable injury, I am assuming that they are accepted as part of the compensable injury and basing my [IR] on those diagnoses being included as part of the compensable injury. Additionally, I would like to point out that the [IR] would not change regardless of which diagnoses were accepted, since I have chosen to use only the range of motion model and not use any of the other methodologies for lower extremity impairment." The hearing officer found that Dr. W determined the claimant reached MMI on May 8, 2015, with a 16% IR and the preponderance of the other medical evidence is not contrary to this report. However, Dr. W makes clear in his narrative that he certified that the claimant reached MMI on the statutory date because he believes he was ordered to do so and based his IR on all of the disputed diagnoses which were determined not to be part of the compensable injury. Accordingly, we reverse the hearing officer's determination that the claimant reached MMI on May 8, 2015, with a 16% IR.

There are three other certifications of MMI and IR in evidence that consider the compensable right ankle sprain/strain and right knee sprain/strain. In evidence was a certification of MMI and IR from a required medical examination doctor, (Dr. M). Dr. M examined the claimant on June 23, 2015, and certified that the claimant reached MMI on September 25, 2013, with a 8% IR based on loss of range of motion of the right lower extremity. However, in his worksheet, Dr. M assessed 5% whole person impairment for the right lower extremity rather than the 8% he assessed on his Report of Medical Evaluation (DWC-69). No explanation is given as to why he assessed 8% rather than the 5% as calculated in his worksheet. Accordingly, Dr. M's certification cannot be adopted.

As previously noted, Dr. W based on his initial examination of March 20, 2015, certified that for the compensable conditions of right ankle sprain/strain and right knee sprain/strain, the claimant reached MMI on July 10, 2013, with a 13% IR.

Additionally, in evidence is a certification from (Dr. O), a required medical examination doctor. Dr. O examined the claimant on March 28, 2016, and certified that the claimant reached MMI on September 25, 2013, with a 1% IR, using the AMA Guides, based on loss of range of motion.

Since there is more than one certification of MMI/IR in evidence that rates the compensable injury, we do not consider it appropriate to render a decision on the issues of MMI and IR. Consequently we remand the issues of MMI and IR to the hearing officer for further action consistent with this decision.

**SUMMARY**

We affirm the hearing officer's determination that the compensable injury of (date of injury), does not extend to a ruptured tendon in the right foot, recurrent dislocation of the right ankle, right LOC primary osteoarthrosis, right knee cysts of the anterior margin of the anterior cruciate ligament, intrasubstance degeneration in the posterior horn of the medial meniscus, and right ankle tear of the flexor hallucis longus tendon.

We reverse the hearing officer's determination that the claimant reached MMI on May 8, 2015, and remand the MMI issue to the hearing officer for further consideration.

We reverse the hearing officer's determination that the claimant's IR is 16% and remand the IR issue to the hearing officer for further consideration.

## REMAND INSTRUCTIONS

The hearing officer is to make a determination of MMI and IR based on the evidence.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Division, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Appeals Panel Decision 060721, decided June 12, 2006.

The true corporate name of the insurance carrier is **HOUSTON INDEPENDENT SCHOOL DISTRICT (a self-insured governmental entity)** and the name and address of its registered agent for service of process is

**KENNETH HUEWITT, SUPERINTENDENT**
**4400 WEST 18TH STREET**
**HOUSTON, TEXAS 77092**.

Margaret L. Turner
Appeals Judge

CONCUR:

K. Eugene Kraft
Appeals Judge

Carisa Space-Beam
Appeals Judge